



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912**

VIA U.S. MAIL AND ELECTRONIC MAIL

October 15, 2018

Brian C. Quiros
Garcia & Milas, P.C.
44 Trumbull Street
New Haven, CT 016510

Re: Town of New Milford v. Standard Demolition Services, Inc., Civil Action No.
1885CV01157, Worcester Superior Court; FOIA Request # EPA-R1-2018-011314.

Dear Mr. Quiros:

This letter responds to a subpoena, dated August 9, 2018, issued at your request as a party in the above referenced state-court matter. The subpoena commands Ms. Kimberly Tisa, an employee of the United States Environmental Protection Agency Region 1 (EPA), to appear and testify upon oral deposition regarding this matter. The subpoena also requires Ms. Tisa to provide certain documents as enumerated within the subpoena. EPA is not a party to this case.

I understand that you have discussed this matter and EPA's regulations and policy with regard to subpoenas with Michael Knapp of our Office of Regional Counsel. Pursuant to these discussions, you agreed that EPA may address the portion of your subpoena seeking documents as a request under the Freedom of Information Act (FOIA). This is consistent with EPA's regulations at 40 C.F.R. § 2.405. Your FOIA request was assigned request number EPA-R1-2018-011314. You requested that EPA authenticate all documents provided, pursuant to 40 C.F.R. § 2.406. You also requested that EPA authenticate 20 other EPA records which were previously provided to you or your office pursuant to previous FOIA requests. On September 28, 2018, EPA provided you with all requested documents, authenticated as requested. Accordingly, EPA understands that the portion of your subpoena seeking documents is resolved.

With regard to the subpoena for Ms. Tisa's testimony, the Agency has regulations which address how it responds to subpoenas of its employees. *See* 40 C.F.R. Part 2, Subpart C. EPA regulations at 40 C.F.R. § 2.402(b) prohibit Agency employees from providing testimony "concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA," unless authorized by the General Counsel or his designee under 40 C.F.R. § 2.404. The purpose of these regulations is to "ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony ... when clearly in the interests of EPA." 40 C.F.R. § 2.401(c). According

to 40 C.F.R. § 2.404, when testimony by an EPA employee is subpoenaed, the employee may provide testimony only when the General Counsel or his designee, in consultation with the appropriate Office Director, determined that compliance with the subpoena would “clearly be in the interests of EPA.” As the designee of EPA’s General Counsel, I am responsible for making this determination.

On October 5th, 2018, you submitted a letter, with exhibits, providing your views as to why it is clearly in the Agency’s interests to allow Ms. Tisa’s testimony. In your letter, you explain that your client, Standard Demolition Services, Inc., (SDS) is currently engaged in litigation with the Town of New Milford, Connecticut (Town) regarding the demolition and cleanup of a building known as “Century Enterprise Center,” or “Century Brass,” or “Century Enterprise” (Site). You assert that Ms. Tisa has been in communication with the Town regarding the remediation of PCBs at the Site. You seek Ms. Tisa’s testimony as a “fact witness” regarding “what she knew and how she intended the Town to address abatement and disposal of PCB contamination that she may/may not know have known about, if the structural steel was painted how she wanted the Town to proceed, and did the paint itself have to be tested before the structural steel was taken offsite and disposed of or recycled.”

EPA has carefully reviewed your submission. In addition, I have consulted with Ms. Tisa, her supervisor, Daniel Wainberg, and Bryan Olson, the Office Director for the Office of Site Remediation and Restoration, regarding this matter. I have reviewed the recommendation of Mr. Wainberg.

I understand that EPA has previously provided you with at least seven responses to FOIA requests over the past three years. These responses document the full extent of the Agency’s involvement with the Town regarding the PCB remediation at the Site to date. EPA’s official decisions pertaining to the Site are contained within the official records previously provided to you. EPA has spent considerable resources responding to these multiple FOIA requests. Ms. Tisa’s testimony would not add anything further to the specific factual context of the PCB remediation at the Century Mill site beyond what is already contained in the documents previously provided to you.

To the extent you seek comment on the requirements for PCB remediation, the proper source for such information is the Toxic Substances Control Act, 15 U.S.C. § 2605(e) and its implementing PCB regulations, 40 CFR Part 761, and official EPA policy and guidance documents, available at <https://www.epa.gov/pbcs/policy-and-guidance-polychlorinated-biphenyl-pbcs>. As an EPA staff-level employee, Ms. Tisa’s testimony could not add anything to EPA’s official positions pertaining to the law, implementing regulations, and/or policy and guidance documents.

Accordingly, I have concluded that providing official time for an Agency employee to testify in this lawsuit would be an inappropriate use of EPA resources. This litigation concerns a matter purely among outside litigants, the outcome of which will have no significant effect upon EPA’s programs, functions, or responsibilities. Allowing such testimony and the necessary preparation would be burdensome and time consuming for Ms. Tisa and would set a precedent that would interfere with the Agency’s mission of protecting human health and the environment. In addition, providing the testimony could be perceived as a failure by the Agency to maintain the

impartiality among private litigants. Because no Federal interest would be served by participation in the deposition, to do so would likely favor one or the other parties in the litigation, contrary to the regulatory proscription. I thus find that the compliance with the subpoena would not clearly be in the interests of EPA.

I therefore request that you withdraw this subpoena. As you may know, subpoenas issued for federal employees' testimony are actions against the United States. Sovereign immunity bars the enforcement of such subpoenas except by express Congressional waiver. Because there has been no such waiver, state-court subpoenas may not be enforced against federal employees. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 472-73 (1951); *Reynold Metal Co. v. Crowther*, 572 F. Supp. 288, 291 (D. Mass. 1982). Please contact Tom Olivier at 617-918-1737 immediately if you do decide to pursue enforcement of this subpoena, in which case EPA will refer this matter to the U.S. Attorney's Office for the District of Massachusetts.

Sincerely,

A handwritten signature in blue ink, appearing to read "Carl F. Dierker", with a long horizontal flourish extending to the right.

Carl F. Dierker
Regional Counsel